# Tan Wei Hong (a child suing through his guardian ad litem and next friend, Chuang Yin E) & Ors v Malaysia Airlines System Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(NCVC)(W)-125–04 OF 2016
ZAWAWI SALLEH, VERNON ONG AND ABDUL RAHMAN SEBLI JJCA
25 APRIL 2017

*Civil Procedure — Striking out — Statement of claim — Appellants filed negligence claims against respondents for causing disappearance, and presumptive death, of passengers of a commercial aircraft — Appellants alleged aircraft never left Malaysian airspace after take-off and respondents were negligent in failing to closely monitor movement of aircraft after it veered off scheduled flight path — Whether matters pleaded in statement of claim against respondents plainly and obviously unsustainable or raised a reasonable cause of action*

The appellants filed claims in negligence against the respondents over their respective roles in causing the mysterious disappearance of a Malaysia Airlines System commercial flight ('MH370') which left Kuala Lumpur for Beijing on 8 March 2014 but never reached its destination resulting in all persons on the flight to be presumed dead. The appellants contended that the third respondent ('R3'), which had specific authority to regulate and oversee all technical operational aspects of the civil aviation industry in Malaysia including civilian air traffic control, service and management, owed them a statutory duty under the Civil Aviation Act 1969 ('the Act') to have tracked and monitored MH370 while it was within Malaysian airspace and ensured there was a safe and proper handing over of the flight from the Kuala Lumpur Air Traffic Control Centre ('KLATCC') to the next air traffic control tower. The appellants said that information available on record showed that MH370 did not leave Malaysian airspace but had made an 'air turn back' towards Penang, a fact that was confirmed by the fourth respondent ('R4'), Leftenan Jeneral Dato Sri Ackbal bin Abdul Samad in his affidavit. R4 had also deposed in his affidavit that despite the 'air turn back', MH370 was classified as 'Friendly' and not posing any threat, hence R4 did not have the responsibility to continue monitoring the movement of the aircraft. The appellants alleged that R4, who controlled and was responsible for the operation of the Royal Malaysian Air Force ('RMAF') in safeguarding Malaysian airspace, owed MH370, its passengers and their next-of-kin a duty of care to have 'investigated and verified any unusual, unidentified, unmarked and/or unaccounted for aircraft that appeared on the RMAF radar at the material time' and that if he 'had

monitored the radar in real-time and taken all necessary actions, the loss of MH370 could have been avoided' as he would have known that the aircraft was completely off its scheduled course. The fifth respondent ('R5'), as the employer of R3 and R4, was sued for being vicariously liable for the acts, omissions, defaults and neglect of R3 and R4 in the discharge of their duties. After filing and serving their defence, R3, R4 and R5 ('the respondents') applied under O 18 r 19 of the Rules of Court 2012 to strike out the appellants' statement of claim. The applications were granted by the High Court; hence the instant appeal against that decision. In the instant appeal, the respondents argued, inter alia, that the appellants' statement of claim failed to plead material particulars to formulate a reasonable cause of action against R3 in negligence whilst the basis of the appellants' claim against R4 was 'highly speculative and pure fanciful conjecture'.

**Held**, allowing the appeal against the striking-out of the action against R3 and R5 and dismissing the appeal against the striking out of the action against R4:

(1) The High Court erred in allowing the application to strike out the suit against R3. The judge overlooked the trite principle that the court would not grant an application to strike out a claim unless it was certain that the claim was bound to fail (see para 47).

(2) In its statement of defence, R3 admitted that it owed a statutory duty to the extent of the provisions of the Act. It was not disputed that R3 was responsible for tracking and monitoring aircrafts. It was directly foreseeable that if R3 failed to keep track, it could lose track of an aircraft and therefore the loss of a plane leading to the presumed death of its passengers was not too remote. R3 was a government agency with the specific authority and duty to regulate all technical operational aspects of the civil aviation industry within Malaysia. The basic duty of the KLATCC was to track and monitor aircrafts. The relationship between the passenger of the flight and R3 was such that they were entitled to rely on R3 to perform its duties with the due care expected of a reasonable person in ensuring the safety of the flight. The preliminary report produced by R5 did not reveal clear evidence that MH370 had left Malaysian airspace; in fact, there was evidence the aircraft had made an air turn back and headed towards Penang. For all those reasons, it was not plain and obvious that R3 did not owe a duty of care to the appellants in discharging its duties and functions under the Act (see paras 31–34).

(3) The appellants' case required the court to enter into a fact-finding analysis to determine whether R3 owed a duty of care to the appellants. It was a triable issue that could only be resolved by the court after careful examination of the evidence from both sides. The court had to guard against the possibility of depriving the appellants of access to the

judgment seat without the benefit of a trial where they had an opportunity to bring forth all the relevant facts (see paras 35 & 46).

(4) This court disagreed with the respondents' submission that the appellants had not pleaded a reasonable cause of action against R3 in their statement of claim. R3's duty of care to have continuously kept track of MH370 while it was within Malaysian airspace and to have ensured a safe and proper transfer of the flight to the next air traffic control tower was clearly pleaded as material facts in the statement of claim and sufficiently supported the claim for negligence against R3. The material facts pleaded were sufficient to give adequate notice to the respondents of the nature of the claim to enable them to answer it and to enable the court to ascertain the exact nature of the questions to be tried (see paras 36 & 38–39).

(5) R4's duty was to guard the sovereignty of the Malaysian airspace. It was not a duty owed to passengers of commercial flights. It was plain and obvious that R4 did not owe any duty of care to the appellants and the claim against R4 was rightly struck out by the High Court (see paras 50 & 58).

(6) As the suit against R3 was wrongly struck out by the High Court, R5 had to remain as a party in this action on the principle of vicarious liability. Hence, the appeal against the striking-out of the suit against R5 was allowed (see paras 62–63).

**[Bahasa Malaysia summary**

Perayu-perayu memfailkan tuntutan-tuntutan dalam kecuaian terhadap responden-responden atas peranan mereka masing-masing kerana menyebabkan kehilangan misteri penerbangan komersial Malaysia Airlines System ('MH370') yang mana terbang meninggalkan Kuala Lumpur ke Beijing pada 8 Mac 2014 tetapi tidak sampai ke destinasinya mengakibatkan kesemua orang di dalam penerbangan tersebut dianggap mati. Perayu-perayu berhujah bahawa responden ketiga ('R3'), yang mempunyai kuasa spesifik untuk mengawal selia dan mengawasi kesemua aspek operasi teknikal industri penerbangan awam di Malaysia termasuk kawalan trafik udara awam, perkhidmatan dan pengurusan, berkewajipan terhadap mereka tugas statutori di bawah Akta Penerbangan Awam 1969 ('Akta') untuk mengesan dan memantau MH370 semasa ia berada di dalam ruang udara Malaysia dan memastikan terdapat penyerahan selamat dan betul terhadap penerbangan dari Pusat Kawalan Trafik Udara Kuala Lumpur ('KLATCC') kepada menara kawalan trafik udara seterusnya. Perayu-perayu menyatakan bahawa maklumat yang sedia ada menunjukkan bahawa MH370 tidak meninggalkan ruang udara Malaysia tetapi telah membuat 'air turn back' ke arah Pulau Pinang, fakta yang disahkan oleh responden keempat ('R4'), Leftenan Jeneral Dato Sri Ackbal bin Abdul Samad dalam afidavitnya. R4 juga telah mendeposkan dalam

afidavitnya bahawa meskipun 'air turn back', MH370 diklasifikasikan sebagai 'Friendly' dan tidak tidak memberikan sebarang ancaman, maka R4 tidak bertanggungjawab untuk terus memantau pergerakan pesawat tersebut. Perayu-perayu mendakwa bahawa R4, yang mengawal dan bertanggungjawab bagi operasi Tentera Udara Diraja Malaysia ('TUDM') dalam menjaga ruang udara Malaysia, bertanggungjawab terhadap MH370, penumpang-penumpangnya dan waris mereka dengan kewajipan berhati-hati untuk 'investigated and verified any unusual, unidentified, unmarked and/or unaccounted for aircraft that appeared on the RMAF radar at the material time' dan bahawa jika beliau 'had monitored the radar in real-time and taken all necessary actions, the loss of MH370 could have been avoided' kerana beliau akan tahu bahawa pesawat tersebut benar-benar tidak mengikut haluan yang dijadualkan. Responden kelima ('R5'), sebagai majikan R3 dan R4, disaman kerana bertanggungjawab secara vikarius bagi tindakan-tindakan, ketinggalan, keingkaran dan kecuaian R3 dan R4 dalam melaksanakan tugas mereka. Selepas memfailkan dan menyerahkan pembelaan mereka, R3, R4 dan R5 ('responden-responden') memohon di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012 untuk membatalkan pernyataan tuntutan perayu-perayu. Permohonan-permohonan dibenarkan oleh Mahkamah Tinggi; maka rayuan ini terhadap keputusan tersebut. Dalam rayuan ini, responden-responden berhujah, antara lain, bahawa pernyataan tuntutan perayu-perayu gagal untuk memplid butir-butir material untuk merumuskan kausa tindakan munasabah terhadap R3 dalam kecuaian sementara asas tuntutan perayu-perayu terhadap R4 adalah 'highly speculative and pure fanciful conjecture'.

**Diputuskan**, membenarkan rayuan terhadap pembatalan tindakan terhadap R3 dan R5 dan menolak rayuan terhadap pembatalan tindakan terhadap R4:

(1) Mahkamah Tinggi tersilap dalam membenarkan permohonan untuk membatalkan tindakan terhadap R3. Hakim mengabaikan prinsip nyata bahawa mahkamah tidak akan membenarkan permohonan untuk membatalkan tuntutan kecuali ia pasti bahawa tuntutan jelas akan gagal (lihat perenggan 47).

(2) Dalam pernyataan pembelaannya, R3 mengaku bahawa ia menunjukkan tugas statutori setakat peruntukan-peruntukan Akta. Ia tidak dipertikaikan bahawa R3 bertanggungjawab untuk mengesan dan memantau pesawat-pesawat. Ia secara langsung dapat dilihat jika sekiranya R3 gagal untuk mengesan, ia boleh kehilangan kesan pesawat dan oleh itu kehilangan pesawat yang membawa kepada anggapan kematian terhadap penumpang-penumpangnya adalah tidak terlalu terpencil. R3 adalah agensi kerajaan dengan kuasa dan tugas spesifik untuk mengawal kesemua aspek operasi teknikal industri penerbangan awam di Malaysia. Tugas asas KLATCC adalah untuk mengesan dan memantau pesawat-pesawat. Hubungan di antara penumpang pesawat dan R3 adalah mereka berhak bergantung ke atas R3 untuk

melaksanakan tugasnya dengan hati-hati yang dijangka daripada orang yang munasabah dalam memastikan keselamatan penerbangan tersebut. Laporan awal yang dikemukakan oleh R5 tidak menunjukkan keterangan jelas bahawa MH370 telah meninggalkan ruang udara Malaysia; sebenarnya, terdapat keterangan pesawat tersebut telah membuat pusingan balik udara dan menuju ke arah Pulau Pinang. Bagi kesemua alasan-alasan tersebut, ia tidak jelas dan nyata bahawa R3 tidak menanggung kewajipan berhati-hati kepada perayu-perayu dalam melaksanakan tugas dan fungsinya di bawah Akta (lihat perenggan 31–34).

(3) Kes perayu-perayu memerlukan mahkamah untuk memasukkan analisis dapatan fakta bagi menentukan sama ada R3 menanggung kewajipan berhati-hati kepada perayu-perayu. Ia adalah isu yang boleh dibicarakan yang hanya boleh diselesaikan oleh mahkamah selepas pemeriksaan teliti terhadap keterangan daripada kedua-dua belah pihak. Mahkamah perlu menjaga terhadap kemungkinan menafikan perayu-perayu akses kepada kedudukan penghakiman tanpa faedah perbicaraan di mana mereka mempunyai peluang untuk mengemukakan kesemua fakta relevan (lihat perenggan 35 & 46).

(4) Mahkamah ini tidak bersetuju dengan penghujahan responden-responden bahawa perayu-perayu tidak memplid kausa tindakan yang munasabah terhadap R3 di dalam pernyataan tuntutan mereka. Kewajipan berhati-hati R3 untuk secara berterusan mengesan MH370 semasa ia di dalam ruang udara Malaysia dan untuk memastikan pindahan yang selamat dan betul pesawat kepada menara kawalan udara seterusnya adalah jelas diplidkan sebagai fakta material di dalam pernyataan tuntutan dan secara mencukupi menyokong tuntutan bagi kecuaian terhadap R3. Fakta diplidkan adalah mencukupi untuk memberikan notis yang wajar kepada responden-responden terhadap sifat tuntutan untuk membolehkan mereka menjawabnya dan untuk membolehkan mahkamah memastikan sifat sebenar soalan-soalan untuk dibicarakan (lihat perenggan 36 & 38–39).

(5) Tugas R4 adalah untuk menjaga kedaulatan ruang udara Malaysia. Ia bukan tugas untuk bertanggungjawab kepada penumpang-penumpang pesawat-pesawat komersial. Ia adalah jelas dan nyata bahawa R4 tidak menanggung kewajipan berhati-hati kepada perayu-perayu dan tuntutan terhadap R4 adalah secara betul dibatalkan oleh Mahkamah Tinggi (lihat perenggan 50 & 58).

(6) Memandangkan tindakan terhadap R3 telah secara salah dibatalkan oleh Mahkamah Tinggi, R5 telah kekal sebagai pihak di dalam tindakan ini atas prinsip liabiliti vikarius. Maka, rayuan terhadap pembatalan tindakan terhadap R5 dibenarkan (lihat perenggan 62–63).]

**Notes**

For cases on statement of claim, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9458–9521.

**Cases referred to**

*Ahmed Jaafar bin Abdul Latiff v Dato' Bandar Kuala Lumpur* [2015] 1 AMR 521, FC (refd)

*Anns and others v London Borough of Merton* [1977] 2 All ER 492; [1978] AC 728, HL (refd)

*Bandar Builders Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, SC (refd)

*Barrett v Enfield London Borough Council* [2001] 2 AC 550; [1999] YJH 25, HL (refd)

*Caparo Industries plc v Dickman and others* [1990] 1 All ER 568, HL (refd)

*Cooper v Hobart* [2001] SCJ No 76; [2001] 3 SCR 537, SC (refd)

*David Chelliah @ Kovilpillai Chelliah David v Monorail Malaysia Technology Sdn Bhd & Ors* [2009] 4 MLJ 253, HC (refd)

*Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin & Ors* [1998] 1 SLR 374, CA (refd)

*Hughes v Richards (t/a Colin Richards & Co)* [2004] EWCA Civ 266, CA (refd)

*Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1, FC (refd)

*Lee Nyan Choi v Voon Noon* [1979] 2 MLJ 28, FC (refd)

*Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor* [2015] 4 MLJ 734, FC (refd)

*Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389, FC (refd)

*Matang Plastik & Metal Work Industries Sdn Bhd & Ors v Daimler Chrysler (M) Sdn Bhd & Ors* [2014] 6 MLJ 244, CA (refd)

*Metroplex Holdings Sdn Bhd v Commerce International Merchant Bankers Bhd* [2013] 4 MLJ 520, CA (refd)

*Parimala a/p Muthusamy & Ors v Projek Lebuhraya Utara-Selatan* [1997] 5 MLJ 488, HC (refd)

*See Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235, CA (refd)

*Sivarasa Rasiah & Ors v Che Hamzah Che Ismail & Ors* [2012] 1 MLJ 473, CA (refd)

*Sri Devi a/p Kanan & Ors v Kerajaan Malaysian Airline System Bhd & Ors* [2017] 7 MLJ 305, HC (folld)

*Sullivan v Moody and Others* [2001] HCA 59; (2001) 207 CLR 562, HC (refd)

*Sutherland Shire Council v Heyman* (1985) 60 ALR 1, HC (refd)

*Tanalachimy a/p Thoraisamy & Ors v Jayapalasingam a/l Kandiah & Ors (sued as liquidators of the Great Alonioners Trading Corp Bhd) and another appeal* [2014] 4 MLJ 85, CA (refd)

*The 'Bunga Melati 5 Case'* [2012] SGCA 46; [2012] 4 SLR 546, CA (refd)

*Williams v Canada (Attorney General)* [2005] OJ No 3508; [2005] 76 OR (3rd) (refd)
*Zulkiply bin Taib & Anor v Prabakar a/l Bala Krishna & Ors and other appeals* [2015] 2 MLJ 607; [2015] 2 CLJ 766, CA (refd)

**Legislation referred to**

Civil Aviation Act 1969 s 2B, 3(1)
Government Proceedings Act 1956 s 5
Rules of Court 2012 O 18 r 19, O 18 r 19(1)(a), (1)(b), (1)(d)

**Appeal from**: Civil Suit No 21NCVC-51–08 of 2015 (High Court, Kuala Lumpur)

*Sangeet Kaur Deo (Tan Chee Kian and Ngeow Chow Ying with her) (Ngeow & Tan) for the appellants.*
*Alice Loke Yee Ching (Shaiful Nizam bin Shahrin with her) (Senior Federal Counsel, Attorney General's Chambers) for the respondents.*

**Zawawi Salleh JCA (delivering judgment of the court):**

INTRODUCTION

**[1]** This appeal is directed against the decision dated 30 May 2016, given by the High Court Kuala Lumpur, allowing the third, fourth and fifth defendants' application to strike out the plaintiffs' claim against them.

**[2]** At the conclusion of the hearing of the appeal, we allowed the plaintiff's appeal in respect of fourth defendant but dismissed the appeal in respect of the third and fifth defendants. We now give the detailed reasons for our decision.

**[3]** For convenience, in this judgment, we will refer to the appellants as the plaintiffs and the respondents as the defendants as they were in the court below.

BRIEF FACTS

**[4]** The brief facts which are necessary to dispose of this instant appeal may be stated as follows:

(a) the plaintiffs are suing as dependents of the deceased persons who were passengers on board flight MH370 which was bound for Beijing from Kuala Lumpur on 8 March 2014. The said flight, however, did not arrive at its destination and all passengers on board were presumed dead;

(b) the third defendant is a government agency established under the purview of the Ministry of Transport of Malaysia with the authority to regulate and oversee all the technical operational aspects of the civil

aviation industry in Malaysia, including but not limited to, civil air traffics control, service and management;

(c) the fourth defendant was and in control of and is responsible for the operation of the Royal Malaysian Air Force ('the RMAF'), including safeguarding the air space within the territories of Malaysia;

(d) the fifth defendant is the Government of Malaysia who is the employer and principal of the third and fourth defendants and vicariously liable for the acts, defaults, omissions or neglects committed by the third and fourth defendants in discharge of their duties in the cause of their employments;

(e) the third, fourth and fifth defendants after having served and filed their defence, have filed an application under O 18 r 19 of the Rules of Court 2012 to strike out the pleadings by the plaintiffs and also to have the action dismissed. The paragraphs relied on in O 18 r 19(1) are (a), (b) and (d). The affidavit in support of the application affirmed by Encik Shaiful Nizam bin Shahrin dated 27 January 2016 and the affidavit in reply by Leftenan Dato' Sri Ackbal bin Abdul Samad affirmed on 25 February 2016 are relied on in respect of grounds (b) and (c) only; and

(f) as alluded to earlier, on 30 May 2016, the learned judge allowed the application by the third, fourth and fifth defendants to strike out the plaintiffs' suit against them. Hence, this appeal.

ISSUE

**[5]** The sole issue for our determination in this instant appeal is whether the learned judge correctly exercised his discretion in allowing the third, fourth and fifth defendants' application to strike out the plaintiffs' claim against them.

THE PRINCIPLES

**[6]** Order 18 r 19 of the Rules of Court 2012 makes provisions for orders striking out pleadings and endorsements. It provides:

19 Striking out pleadings and endorsements (Order 18 rule 19)

(1) The court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court; and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be. A

(2) No evidence shall be admissible on an application under paragraph (1)(a).

B

[7] The court will adopt the following as principles applicable to the consideration of an application to strike out pleadings and endorsements:

(a) in considering the defendants' application under O 18 r 19(1)(a), no affidavit evidence is admissible;

C

(b) all the averments in the statement of claim must be assumed to be true;

(c) the court should only exercise its powers sparingly and only in clear cases;

(d) the test to be applied is whether on the face of pleadings, the claim is obviously unsustainable. The matter must be unarguable or almost incontestably bad; D

(e) the burden is on the defendants to show to the court that the plaintiffs' claim is so plain and obviously unsustainable or in other words, the plaintiffs' claim is bound to fail at trial;

E

(f) where there is a dispute as to the factual matrix of the case, the court would not strike out the pleadings and endorsements;

(g) the power to strike out pleadings and endorsements should be exercised after the court has considered all facts, but the court must not embark a minute examination of the documents and the facts of the case as this is solely reserved for the trial judge; F

(h) a pleading is 'frivolous' or 'vexation' when its discloses no reasonable cause of action on its face. The *Oxford English Dictionary* defines 'frivolous' as follows: *b Law*. In pleading: Manifestly insufficient or futile. *Black Law Dictionary*, (9th Ed). (Thomson Reuters, St Paul, Minnesota, 2009), defines 'frivolous' as 'lacking a legal basis or legal merit; not serious; not reasonably purposeful ...'; and 'frivolous suit' as ' A lawsuit having no legal basis, often filed to harass or extort money from the defendant'. Among the definitions of 'vexatious' and 'vexation' in the *Oxford English Dictionary* are the following: G H

*Vexatious 1*. Causing, tending or disposed to cause, vexation.

c *spec* Of legal actions: Instituted without sufficient grounds for the purpose of causing trouble or annoyance to the defendant.

And, '*Vexation*, the action of troubling or harassing by aggression or interference (sometimes *spec* by unjustifiable claims or legal action)'. I

*Black Law Dictionary* defines 'vexatious suit' as 'a lawsuit instituted maliciously and without good grounds, meant to create trouble and expense for the party being sued';

(i) the *Oxford English Dictionary* defines 'abuse (of process) as (ii) wrong or improper use, misuse, misapplication, perversion; turning the wrong way, diversion to an improper use, corruption, distortion'. A pleading is an abuse of process if the litigation process is used for improper purpose; eg, where the proceedings constitute a sham; where the process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose;

(j) in exercising the power under O 18 r 19(1)(d), the court is not limited to considering the pleadings of the parties, but is entitled to consider affidavit relating to the issues in the case; and

(k) where the court is to exercise its inherent jurisdiction to dismiss a claim, it is important that there is no dispute between the parties on issues of facts.

(See *Bandar Builders Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; *Metroplex Holdings Sdn Bhd v Commerce International Merchant Bankers Bhd* [2013] 4 MLJ 520; *Tanalachimy a/p Thoraisamy & Ors v Jayapalasingam a/l Kandiah & Ors (sued as liquidators of the Great Alonioners Trading Corp Bhd) and another appeal* [2014] 4 MLJ 85; *See Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235; *Sivarasa Rasiah & Ors v Che Hamzah Che Ismail & Ors* [2012] 1 MLJ 473; *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin & Ors* [1998] 1 SLR 374).

**[8]** Concerning 'abuse of process', *Supreme Court Practice, 1995*, p 344 (Sweet & Maxwell), observed as follows:

> This term connotes that the process of the court must be used bona fide and properly and must not be abused. The court will prevent improper use of its machinery and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation ... The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances. And for this purpose considerations of public policy and the interests of justice may be very material.

**[9]** We hasten to add that clearly the courts have a duty to uphold the integrity of the judicial system by declining to adjudicate on matters which constitute an abuse of the courts' process. While the circumstances in which the pleadings themselves will disclose no reasonable cause of action on their face will be relatively limited, the inherent jurisdiction of the court to look beyond the pleadings has meant that it can act at a relatively early stage to strike out proceedings where claim is clearly unsustainable and cannot succeed. Order 18 r 19(1)(d) represents an important weapon in the armoury of the courts to prevent abuse of process. Order 18 r 19(1)(d) extends beyond the other grounds and capture all other instances of misuse of the court's process,

such as a proceedings that has been brought with an improper motive or an attempt to obtain a collateral benefit. A

**[10]** It is with the above principles at the forefront of our minds that we proceed to consider this instant appeal. B

THE ACTION AGAINST THE THIRD DEFENDANT

**[11]** Stripped to its essentials, the plaintiffs' case against the third defendant is that the third defendant is a government agency with the specific authority and duty to regulate all technical operational aspects of the civil aviation industry within Malaysia. The Kuala Lumpur Air Traffic Control Centre ('KLATCC') is within the control of the third defendant. C

**[12]** The plaintiffs' pleaded that the third defendant owed a duty to the plaintiffs in two aspects: D

(a) the KLATCC had a basic duty to track and monitor MH370 while within the Malaysia airspace; and

(b) to ensure a safe and proper transfer to the next air traffic control tower. E

**[13]** Learned counsel for the plaintiffs contended that the material on record showed that MH370 did not leave Malaysian airspace and in fact made a turn back towards Penang (see The Malaysian ICAO Annex 13 Safety Investigation Team for MH370, Ministry of Transport, Malaysia, exhibited in the plaintiffs' supplementary affidavit). F

**[14]** This fact was further supported by the Affidavit affirmed by the fourth defendant, Leftenan Jeneral Dato' Sri Ackbal bin Abdul Samad TUDM (371302) where the fourth defendant has given sworn evidence that the aircraft did an air turn back. He deposed: G

> 3(b) Apabila pesawat MH370 dikesan atas radar tentera udara Diraja Malaysia dan didapati membuat satu 'air turn back' TUDM telah membuat klasifikasi mengikut prosedur yang telah ditetapkan. Pesawat MH370 telah diklasifikasikan sebagai 'FRIENDLY' dan dilihat tidak memberi ancaman (threat). Oleh itu, Defendan ke-4 tidak mempunyai tanggungjawab untuk mengambil tindakan lanjut untuk terus memantau pergerakan pesawat tersebut. H

**[15]** Learned counsel for the plaintiffs posited that the duty owed by the third defendant is a statutory one by virtue of the Civil Aviation Act 1969. I

**[16]** In reply, learned senior federal counsel appearing for the defendants submitted that if the plaintiffs' cause of action is breach of statutory duty, they must plead in their statement of claim:

A (a) facts supporting the alleged breach of statutory duty. The statute must also be specific in the duty it imposes;

(b) facts stating the nexus between the breach and the damage which resulted; and

B (c) facts stating the damage which resulted was occasioned to the plaintiffs and caused by the defendants.

**[17]** Learned senior federal counsel vehemently argued that paras 27–31 of the statement of claim are devoid of facts in respect of the above matters. The C particulars of breach in para 31 throw no light as to how the statutory duty arises (see *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1).

**[18]** Learned senior federal counsel further submitted that before a duty of D care can be said to exist, the plaintiffs must fulfilled the following three factors:

(a) the damages must be foreseeable;

(b) there is a close and direct relationship of proximity between the plaintiffs and the defendants; and

E (c) the circumstances must be such that it is just, fair and reasonable to impose a duty of care.

**[19]** In support of her submission, reliance was placed on following cases:

F (a) *Caparo Industries plc v Dickman and others* [1990] 1 All ER 568;

(b) *Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor* [2015] 4 MLJ 734; and

(c) *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389.

G

**[20]** In a nutshell, learned senior federal counsel argued that in this instant appeal the essential ingredients of duty of care in a cause of action in negligence does not exist and an action in negligence cannot be maintained. The plaintiffs H have not pleaded a reasonable cause of action in their statement of claim.

**[21]** Perhaps, in order to better appreciate the issues raised by the parties, it is helpful to note briefly on the law of negligence. There are five distinct element of negligence:

I (a) that the defendant had a obligation to the plaintiff to take care (ie he owed a duty of care to the plaintiff);

(b) that the defendant should have observed a particular standard of care in order to fulfil or perform that duty;

(c) that the defendant breached his duty of care by failing to fulfil or observe the relevant standard of care;

(d) that the breach of duty caused harm to the plaintiff; and

(e) that such harm was not too remote or unforeseeable such that the defendant is to liable for its occurrence (see *Fridman, Gerald Henry Louis, The Law of Torts in Canada, Vol I, Toronto, Carswell 1989*, at p 317).

**[22]** In *Anns and others v London Borough of Merton* [1977] 2 All ER 492; [1978] AC 728 ('Anns'), Lord Wilberfore set out two stages test in order to determine whether a duty of care should exist in a given situation. The plaintiff must establish:

Stage 1

(a) that the harm complained of by the plaintiff was reasonably foreseeable consequence of the defendant's alleged failure to take care;

(b) that there is a sufficiently 'proximate' or 'close and direct relationship' between the parties such that it would be fair, just and reasonable to impose a prima facie duty of care on the defendant; and

Stage 2

(c) that there are no 'residual' broad policy reasons to negate or limit this prima facie duty of care.

**[23]** Fear that the *Anns* test would lead to exponential development of the duty of care led the courts to favour an alternative test. This test, first developed by Deane J in the High Court of Australia, initially consisted of foreseeability and proximity. To these elements, the requirement that it must be fair, just and reasonable in the circumstances to impose a duty of care was added in the case of *Caparo*. The introduction of the three-part test reflected a more conservative approach to duty, and it coincided with a return to incremental development, also spearheaded by the Australian High Court (see eg *Sutherland Shire Council v Heyman* (1985) 60 ALR 1).

**[24]** The three-part test remains — at least in theory — applicable in the UK, but it has been abandoned in Australia (see *Sullivan v Moody and Others* [2001] HCA 59; (2001) 207 CLR 562), which now favours a 'salient features' approach to the determination of duty, due in large part to concern about the unsatisfactory nature of the proximity requirement. Although introduced as a tool for filtering out claims which lack the requisite closeness, proximity has always been a notoriously vague concept and its role has been undermined by its nebulous and indefinable nature. Canada has adopted a modified version of the *Anns* test, incorporating aspects of the *Caparo* test (see *Cooper v Hobart* [2001] SCJ No 76; [2001] 3 SCR 537). At the first stage, there must

be reasonable foreseeability of harm and sufficient proximity between the parties for it to be fair and just to impose a duty of care. At the second stage, the court examines whether there are residual public policy considerations to justify denying liability.

**[25]** In recent years, the courts have moved away from the somewhat reactionary approach which marked their response to *Anns*. As a result, even in jurisdictions where *Caparo* still applies, negligence has been allowed more scope for development, although still in a largely incremental manner.

**[26]** It is pertinent to note that in cases involving public authorities, as in the present one, factor giving rise to proximity must be also be grounded in the governing statute (see *Cooper*).

**[27]** Turning now to this instant appeal. Duties and functions of the third defendant are provided by s 2B of the Civil Aviation Act 1969 as follows:

> Duties and functions of the Director General —
>
> 2B It shall be the duty and function of the Director General —
>
> (a) to exercise regulatory functions in respect of civil aviation and airport and aviation services including the establishment of standards and their enforcement;
>
> (b) to represent the Government in respect of civil aviation matters and to do all things necessary for this purpose;
>
> (c) to ensure the safe and orderly growth of civil aviation throughout Malaysia;
>
> (d) to encourage the development of airways, airport and air navigation facilities for civil aviation;
>
> (e) to promote the provision of efficient airport and aviation services by the licensed company; and
>
> (f) to promote the interests of users of airport and aviation services in Malaysia in respect of the prices charged for, and the quality and variety of, services provided by the licensed company.

**[28]** Section 3(1) of the Civil Aviation Act 1969 requires the Minister to give effect to the Chicago Convention. Annex 11 of the Chicago Convention provides detail requirements of Air Traffic Control Services. These are mandatory guidelines to be followed by all contracting states in order to ensure uniformity of standards of procedure. The said annexure provides detailed guidelines in relation to, amongst other, the following:

(a) the objectives of air traffic services (cl 2.2);

(b) measures to be taken if the aircrafts position is not known is clearly spelt out in cl 2.24.1.1.1. This includes informing the appropriate military units and providing them with pertinent flight information;

(c) coordination between air traffic control units (cl 3.3); and

(d) detailed procedures on the coordination of transfer between air traffic control units.

**[29]** The critical issue to be determined in this instant appeal is whether an action in negligence can lie against the third defendant in the exercise of his functions under the Civil Aviation Act 1969.

**[30]** Learned counsel for the plaintiffs submitted the learned senior federal counsel appearing for the defendants has herself conceded in *Sri Devi a/p Kanan & Ors v Kerajaan Malaysian Airline System Bhd & Ors* [2017] 7 MLJ 305 that the third defendant does in fact owe a duty of care. The learned judge stated at para 27:

> [27] In the course of submissions, I had asked learned senior federal counsel whose responsibility it is to regulate and manage the safe passage of aircraft over Malaysian airspace (ie air traffic control functions). *Counsel conceded that this was a duty of the DCA*. Yet this duty was not specifically set out in s 2B. It follows therefore that s 2B is not meant to be an exhaustive listing of the duties and obligations of the Director General of Civil Aviation. Accordingly, the mere fact that the pleaded particulars of breach cannot be related to a duty or function set out in s 2B does not mean that the action against the Director General of Civil Aviation ought to be struck out. (Emphasis added.)

**[31]** In its statement of defence, the third defendant admitted that it owes a statutory duty to the extent of the provisions of the Civil Aviation Act 1969.

**[32]** It is not disputed that the third defendant is responsible to track and monitor aircrafts. It is directly foreseeable that if the third defendant fails to keep track, the third defendant could lose track of an aircraft and therefore the loss of the plane leading to the presumed death of the passengers is not too remote.

**[33]** Further, the third defendant is a government agency with the specific authority and duty to regulate all technical operational aspects of the civil aviation industry within Malaysia. The basic duty of the KLATCC is to track and monitor aircrafts. The relationship between the passenger of the flight and the third defendant is such that they are entitled to rely on the third defendant performing its duties with due care expected of reasonable person in ensuring the safety of the flight. The preliminary report produced by the fifth defendant and or its servants, does not reveal clear evidence of MH370 leaving Malaysian

A airspace. In fact, the said report shows evidence of the aircraft made an air turn back and headed towards Penang.

**[34]** For all the foregoing reasons, we are of the view that it is not plain and obvious that the third defendant does not have a duty of care to the plaintiffs in
B discharging its duties and functions under the Civil Aviation Act 1969.

**[35]** We do not comment on whether the evidence and the applicable law will in fact establish a claim for negligent against the third defendant at the time
C of trial. We think that the plaintiffs' case requires the court to enter into a fact finding analysis in order to determine whether the third defendant owes a duty of care to the plaintiffs and this court must guard against the possibility of depriving the plaintiffs of access to the judgement seat without benefit of a trial where they have an opportunity to bring forth all the relevant facts.

D

**[36]** Now, we turn to the issue concerning the plaintiffs' statement of claim. We disagree with the submission of the learned senior federal counsel that the plaintiffs have not pleaded a reasonable cause of action in their statement of claim.

E

**[37]** The plaintiffs' case against the third defendant is contained in paras 27–31 of the statement of claim. Paragraph 30 sets out the essence of the claim where the plaintiffs alleged that 'the third defendant owed a duty of care
F to the deceased persons to ensure continuous tracking of MH370 while within the Malaysian airspace and upon transfer of airspace jurisdiction, to ensure a safe and proper transfer to the next air traffic control'.

**[38]** We are satisfied that the plaintiffs' statement of claim was sufficient to
G the put the defendants to notice of the essence of the plaintiffs' claim. The third defendant's duty of care to ensure continuous tracking of MH370 while within the Malaysia Airspace and to ensure a safe and proper transfer to the next air traffic control tower is clearly pleaded as material facts. These facts, in our view, were sufficient to support the claim for negligence on the part of the third
H defendant.

**[39]** It is pertinent to note that whether or not a particular act or omission on the part of the third defendant amounts to a breach of care is a question of law which need not to be pleaded. Taking the generous reading to the statement of
I claim, as we require to do so in an application to strike out pleadings, we are satisfied that the material facts pleaded in the plaintiffs' statement of claim are sufficient to give adequate notice to the defendants of the nature of the plaintiffs' claim to enable the defendants to answer the claim and to enable the court to ascertain the exact nature of the questions to be tried.

**[40]** We also of the view that the issue concerning the duty of care of the Director General of Civil Aviation to track and monitor an aircraft within the Malaysian airspace and to ensure a safe and proper transfer to the next our traffic is not yet clear, uncertain or is in a state of development. It is well established that courts must be especially careful not to strike out claims made under such circumstances. In *Barrett v Enfield London Borough Council* [2001] 2 AC 550 at p 557; [1999] YJH 25, Lord Browne Wilkinson said:

> In my speech in the *X Bedfordshire case* [1995] 2 AC 633 at pp 740–741 with which the other members of the House agreed, I pointed out that unless it was possible to give a *certain* answer to the question whether the plaintiff's claim would succeed, the case was inappropriate for striking out. I further said that in an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out.

**[41]** In *Williams v Canada (Attorney General)* [2005] OJ No 3508; [2005] 76 OR (3rd), the court had this to say:

> The court should not strike a pleading on the ground that it discloses no reasonable cause of action unless it is 'plain and obvious' on the basis of the facts pleaded by the plaintiff that the existence of the cause of action could not be established at trial. For this purpose, it must be presumed that the plaintiff's allegations of fact will be proven unless they are manifestly incapable of proof. It has also been held consistently that, for the purpose of applying the test, the statement of claim must be read generously with allowance for inadequacies due to drafting deficiencies and that the novelty of a cause of action is not, in itself, a factor that would justify a decision to strike. In addition, it has been held in a number of cases that the decision to strike should not be made if it would require a resolution of difficult legal questions in an area where the law is unsettled.

**[42]** That, however, is not the end of the matters. The plaintiffs also have pleaded the application of *res ipsa loquitor* against all the defendants to establish their claim. Learned senior federal counsel submitted the plaintiffs' reliance on the doctrine is misconceived. The doctrine is not to be relied on to supplement inadequate facts.

**[43]** In support of her submission, reliance was placed on the case of *Matang Plastik & Metal Work Industries Sdn Bhd & Ors v Daimler Chrysler (M) Sdn Bhd & Ors* [2014] 6 MLJ 244.

**[44]** Further, according to her, for the doctrine to apply to the third defendant, the plaintiffs must show that the loss of MH370 and consequently

A the loss of loves of the deceased persons were under the sole management and control of both the defendants. It is obvious from the circumstance that this was not the case (see *Ahmed Jaafar bin Abdul Latiff v Dato' Bandar Kuala Lumpur* [2015] 1 AMR 521).

B **[45]** In reply, learned counsel for the plaintiffs submitted that the third defendant was responsible for the tracking of the aircraft while in Malaysian airspace. If the third defendant had carried out its duties, which was to continuously track the aircraft and ensure proper and safe hand over to the C corresponding air space, it would be fair to conclude that the third defendant would not have lost track of the flight. As the cause of the incident was not known, therefore, the plaintiffs are entitled to rely on the said principles (see *Parimala a/p Muthusamy & Ors v Projek Lebuhraya Utara-Selatan* [1997] 5 MLJ 488; *David Chelliah @ Kovilpillai Chelliah David v Monorail Malaysia* D *Technology Sdn Bhd & Ors* [2009] 4 MLJ 253).

**[46]** In our view, this issue requires a close examination by the court and it will only be resolved after careful examination of the evidence from both sides which this court cannot embark on at this preliminary stage. This is a triable E issue to be decided at the trial.

**[47]** Premised on the above reasons, we are of the opinion that the learned judge had erred in allowing the defendants' application to strike out the suit against the third defendant. The learned judge overlooked the trite principle F that the court will not grant an application to strike out a claim unless it is certain that the claim is bound to fail (see *Hughes v Richards (t/a Colin Richards & Co)* [2004] EWCA Civ 266).

G **[48]** The power to strike out pleadings and endorsements is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realisation that the rules of natural justice requires that the court must not drive away any litigant however weak his case may be, from the seat of justice. This is a time — honoured legal principle (see *Lee Nyan Choi v Voon Noon* [1979] H 2 MLJ 28)

**[49]** In the result, we allowed the plaintiffs' appeal in respect of the third defendant.

I THE CLAIM AGAINST THE FOURTH DEFENDANT

**[50]** The fourth defendant is a public officer performing a specific function. His duty is to guard the sovereignty of the Malaysian airspace. It is not a duty owed to passengers of commercial flights.

**[51]** The claim in respect of the fourth defendant is contained in paras 30–40 of the statement of claim. The claim is predicated in the common law cause of action in negligence. A

**[52]** In para 32 of the statement of claim, the plaintiffs alleged that the fourth defendant has a duty to investigate and verify any unusual, unidentified, unmarked and/or unaccounted for aircraft appearing on its radar at the material time. B

**[53]** Learned counsel for the plaintiffs submitted that the duty owed by the fourth defendant is by virtue the provisions of: C

(a) the Chicago Convention;

(b) the Civil Aviation Act 1969; and

(c) Malaysian's National Defence Policy. D

**[54]** Learned counsel for the plaintiffs posited that the Civil Aviation Act 1969 stipulated that the provisions of the Chicago Convention are to be given effect and carried out. The Chicago Convention places certain duties on the military of each contracting state, in relation to civilian aircrafts. As such, in relation to MH370, the fourth defendant certainly did owe duty of care to the said aircraft, the passengers therein and their next of kin. E

**[55]** Learned counsel for the plaintiffs further submitted that the fourth defendant had admitted that MH370 did an air turn back and was classified as 'friendly'. Had the fourth defendant carried its duty properly, the fourth defendant would have known that the said aircraft was completely off its schedules course and it would be safe to conclude that the aircraft would not have been lost. The plaintiffs alleged in para 39 of the statement of claim that: 'had the fourth defendant monitored the radar in real-time and took all necessary actions thereat, the loss of the said Aircraft could have been avoided'. F G

**[56]** In this regard, we agree with the submission of learned senior federal counsel that this assertion is highly speculative and pure fanciful conjecture. The plaintiffs themselves were not even certain if the damage could have been avoided. H

**[57]** We are in full agreement with the judgment of Azizul Azmi Adnan in *Sri Devi a/p Kanan & Ors* wherein His Lordship stated: I

> [33] In the statement of claim, the plaintiffs claimed that, among others, TUDM did not take adequate steps after their military radar detected the turning back of MH370 from its original north-easterly course.

A [34] In my judgment, the air force does not owe any duty of care to private citizens, whether to track and report the location of non-military aircraft, to intercept or to search for such aircraft, or, as suggested by the statement of claim, to be accountable for adequate and satisfactory answers to the family members such as the plaintiffs.

B [35] The primary duty of TUDM is to guard the safety of Malaysian airspace from external threats to the sovereignty of the nation. The government may, as a matter of practice and custom, utilise the resources for the military for what may essentially be civilian purposes (such as search and rescue, or relief work in the event of a natural disaster), but the military does not and cannot owe a duty to ordinary private citizens for the discharge of those functions. The existence of such a duty C would subvert and compromise the principal aim of a military force.

[36] Of course, this does not mean that the military is immune from suits brought by private citizens. For example, if in the proper performance of its functions an accident is caused by the military resulting in loss or damage to a private citizen, that citizen will be well within his or her rights to claim for compensation for such loss D or damage. That was not, however, the case here.

[37] I therefore allowed the striking out of the plaintiffs' action against Gen Tan Sri Rodzali Daud and TUDM on grounds that the statement of claim did not disclose any reasonable cause of action against either of these defendants.

E

**[58]** It is plain and obvious that the fourth defendant dose not owe any duty of care to the plaintiff and we find it impossible to conclude otherwise in this instant appeal. Therefore the claim against the fourth defendant was rightly struck out by the learned judge.

F

**[59]** In *The 'Bunga Melati 5 Case'* [2012] SGCA 46; [2012] 4 SLR 546, the Singapore court explained that a claim can be either 'legally or factually unsustainable'. The court stated at paras 32–33:

G (a) legally unsustainable: if 'it may be clear as a matter of law at the outset that even if a party were to proceed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks'; or

(b) factually unsustainable: If it is 'possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirety without H substance, (for example, if it is) clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based'.

**[60]** The plaintiffs' appeal in respect of the fourth defendant, must, I therefore, succeed.

THE CLAIM AGAINST THE GOVERNMENT OF MALAYSIA

**[61]** The claim against the fifth defendant is based upon:

(a) vicarious liability principle applying to the government as employer of the third and fourth defendants'; and

(b) the fifth defendant's duty to manage the disappearance with due care, respect, transparency and accountability.

**[62]** Having found that the suit against the third defendant was wrongly struck out by the learned judge, we are of the opinion that the fifth defendant should remain as a party in this action on the principle of vicarious liability (see *Zulkiply bin Taib & Anor v Prabakar a/l Bala Krishna & Ors and other appeals* [2015] 2 MLJ 607; [2015] 2 CLJ 766 (CA) and s 5 of the Government Proceedings Act 1956).

**[63]** Therefore, the plaintiffs' appeal in respect of the fifth defendant was allowed.

CONCLUSION

**[64]** In the result, we allowed the plaintiffs' appeal in respect of the fourth defendant and dismissed the appeal in respect of the fourth and fifth defendants. We made no order as to costs. So ordered.

*Order accordingly.*

Reported by Ashok Kumar